No. 78-19

# In the Supreme Court of the United States

OCTOBER TERM, 1978

FRUEHAUF CORPORATION, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The memoranda and orders of the district court denying petitioners' motions to dismiss the indictment (Pet. App. 74-77) and for a new trial (Pet. App. 78-104) are not officially reported. The opinion of the court of appeals (Pet. App. 1-73) is reported at 577 F.2d 1038.

### JURISDICTION

The judgment of the court of appeals was entered on May 5, 1978 (Pet. App. 105), and a petition for

rehearing was denied on June 6, 1978 (Pet. App. 106). The petition for a writ of certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether there was a fatal variance between the indictment and the evidence adduced at trial.

2. Whether petitioners' convictions for conspiracy: (a) to defraud the United States by obstructing the functions of the Internal Revenue Service; (b) to evade the payment of excise taxes; and (c) to aid in the preparation of false excise tax returns, were barred by either the six-year statute of limitations of 26 U.S.C. 6531(8) or the five-year period of 18 U.S.C. 3282.

3. Whether the indictment properly charged the offense of conspiracy.

## STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioners, Fruehauf Corporation, William E. Grace, and Robert Rowan,[1] were convicted of conspiracy, in violation of 18 U.S.C. 371, (a) to defraud the United States by obstructing the lawful functions of the Internal Revenue Service; (b) to attempt to have Fruehauf evade the payment of federal excise taxes; and (c) to aid or assist in the preparation of materially false and fraudulent excise tax returns for Fruehauf (Pet. App. 1-2, 37-38 n.20). The district court fined Fruehauf $10,000. It sentenced petitioners Grace and Rowan to serve prison terms of six months and one day (the one day was suspended), followed by a two-year period of unsupervised probation, and fined each of them $10,000 (Pet. App. 2). The court of appeals affirmed (Pet. App. 1-73).

The indictment charged that petitioners' conspiracy employed two fraudulent schemes that sought to reduce Fruehauf's excise taxes during the years 1956 to 1965. The first scheme, which involved a supplemental billing plan, attempted to reduce the excise tax base for the trailers sold by Fruehauf without reducing gross income. The second scheme involved

[1] Petitioners Grace and Rowan were officers of Fruehauf Corporation. Petitioner Grace held the following positions in Fruehauf: vice-president (1955-1957); executive vice-president (1957-1958); president (1958-1965); and president and chief executive officer (1959-1965). Petitioner Rowan held the following positions: controller (1955-1962); controller and vice-president (1962-1964); and vice-president for finance (1964-1965). During the period of the alleged conspiracy, Rowan was responsible for Fruehauf's accounting and for its tax and record-keeping policies, including all excise tax procedures (Pet. App. 3-4).

Unindicted co-conspirator Kenneth A. Morris was manager of Fruehauf's Tax Department from 1951 through 1965 and was responsible, under petitioner Rowan's direction, for correctly reporting Fruehauf's taxes, including federal manufacturer's excise tax. Unindicted co-conspirator Robert M. Chawner (now deceased) was assistant controller of Fruehauf (1955-1964) and controller of the Fruehauf Division of Fruehauf Corporation (1962-1964) (Pet. App. 4).

claiming excessive excise tax credits for the tires sold with the trailers by computing the tire tax credit on invoice prices without any adjustment for rebates from the tire manufacturers. These two schemes resulted in the understatement of Fruehauf's excise tax liability by more than $12,000,000 during the period of the conspiracy (Pet. App. 8).

1. *The Supplemental Billings Scheme.* Section 4061 of the Internal Revenue Code of 1954 imposes a tax on the sale of motor vehicles and parts (including trailers) by the manufacturer. The amount of tax is computed by applying the applicable tax rate to the price of the motor vehicle or part.[2] Prior to December 1956, distributors of Fruehauf paid 61.75% of the list price for trailers, thereby receiving a discount of 38.25% (Pet. App. 7).

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[2] Section 4216(a) provides for inclusion of packing costs but exclusion of shipping costs from the price for which the article is sold.

Section 4216(b) was amended, effective January 1, 1959, to provide for a constructive sales price that enables a manufacturer which sells at both retail and wholesale to compute the excise tax on all sales based upon the highest price for which the motor vehicle or part is sold at wholesale. Prior to the amendment of this provision, Fruehauf had based its excise tax on the discounted price at which sales were made at wholesale to independent distributors. This practice was approved by the Treasury in a private letter ruling issued to Fruehauf in 1949 (Pet. App. 5-6). Thus, although Fruehauf sold 94% of its trailers at retail, the effect of the private letter ruling and the 1959 amendment of Section 4216(b) was to enable Fruehauf to use its wholesale price as the base for excise tax computations on all sales.



On December 13, 1956, Rowan and Morris, the manager of Fruehauf's Tax Department, met with the company's Washington, D.C. counsel for the purpose of obtaining approval of a "supplemental charge plan." The plan contemplated subtraction of certain "extra" services allegedly rendered to Fruehauf's distributors from the price of a trailer. Fruehauf would bill the distributors separately for these charges with a corresponding increase in the discount to the distributors. Since the wholesale "price" of the trailer would be reduced, the excise tax base for both wholesale and retail sales would likewise be reduced (Pet. App. 9). Fruehauf's counsel approved this plan, on the conditions that (1) it could be demonstrated that a particular distributor actually received the service for which the distributor was charged, (2) the proposed charges would be based on the cost of the services performed, and (3) records would be maintained showing the services rendered to each distributor. Counsel advised Rowan and Morris that a flat charge to a distributor for services never performed, even if billed separately, was part of the selling price of the trailer and would have to be included in the excise tax base (Pet. App. 10-11).

The supplemental charge plan as implemented did not follow the plan approved by Fruehauf's counsel. Rather, the discount to distributors was increased to 42% off list price with supplemental charges for "advertising," "management consulting fees," and "interest" billed back to the distributors. These supplemental billings to each distributor equalled the

3.75% increase in the discount and bore no relationship to actual services rendered (Pet. App. 12-13). This supplemental billing practice was maintained on a confidential basis so that Fruehauf's excise tax position would not be endangered (Pet. App. 13).[3]

In 1959, Grace, Rowan and Morris discussed the tax aspects of Fruehauf's handling charge, which had theretofore been included in the price of the trailers. Grace recalled that the Hobbs Trailer Company, prior to its acquisition by Fruehauf, had obtained a ruling from the Internal Revenue Service that a "get ready" (installation) charge could be included in the list price of the trailers but excluded from the excise tax base (Pet. App. 20). On the representation that Fruehauf's handling charges were the same as Hobbs' installation charges, Fruehauf's counsel advised that Fruehauf could use the Hobbs method of including the handling charge in the list price but excluding it from the excise tax base (Pet. App. 20).

Fruehauf's handling charges, however, were significantly different from Hobbs' installation charge

[3] Within nine months of the commencement of the supplemental charge plan, Fruehauf had increased the charges for advertising and management consultant fees to amounts substantially in excess of those conditionally approved by counsel. Indeed, the overstatements were such that it resulted in distortion of Fruehauf's budget. Accordingly, the supplemental charges were removed from the expense and income account and recorded as reductions to the cost account applicable to new trailers. Even though Morris expressed concern in 1958 that sufficient records were not being maintained, petitioner Rowan took no steps to maintain sufficient records in accordance with the original advice of counsel (Pet. App. 15-16).



because they were not limited to installation but also covered the repair of minor manufacturing defects. Fruehauf's charge for these services was a flat $50, without regard to the actual cost incurred (Pet. App. 20-21). The implementation of the Hobbs method by Fruehauf resulted in the maintenance of a double set of invoices for each trailer sold to a distributor. This double invoicing had the effect of misleading the Internal Revenue Service as to the true nature and treatment of Fruehauf's handling charge (Pet. App. 21).

In November 1959, Fruehauf increased its distributor discount from 42% to 45% off the list price. This was done despite the fact that Fruehauf had not conducted any studies that would support an increase in the supplemental charges. Fruehauf correspondingly increased its supplemental charges from 3.75% to 5% of list and increased the interest rate on the distributor's open accounts from 4½% to 6% per annum (Pet. App. 22).

Less than two years later, in September 1961, Fruehauf, with the specific approval of Grace, again increased its discount to distributors, this time to 50% off list, plus $50 per unit. At this rate of discount, Fruehauf was selling certain models of its trailers to distributors virtually at cost. In developing list prices, Fruehauf employed a rule of thumb that cost was 50 percent of the list price. The evidence established that "[t]his * * * increase in the distributor discount was motivated by excise tax * * * considerations." In a memorandum dated February

13, 1962, Grace advised R. N. Biggers, the vice-president of Fruehauf Corporation in charge of the Hobbs Division, that the reason for the "fooling around we have done with Federal Excise Tax" was that "Fruehauf will pick up some $20,000 per month by a 50 percent discount with a 5 percent charge-back than they would if they had stayed at 45 percent and charged back 5 percent" (Pet. App. 22).

The September 1961 price change to distributors concealed a warranty allowance that had previously appeared as a separate deduction on each distributor equipment invoice. This change effectively eliminated the warranty charge to retail purchasers from the excise tax base attributable to retail sales. This action was contrary to a ruling by the Internal Revenue Service that a warranty charge to retail purchasers must be included in the excise tax base in computing the tax on retail sales (Pet. App. 23-24). As petitioner Grace explained to one of the distributors, Fruehauf "changed the name from warranty to something else in order to help out a little on the tax problem" (Pet. App. 24).

In January 1962, Fruehauf began recovering a $50 per unit "make-ready" allowance[4] made to its

[4] The make-ready allowance was made to Fruehauf's distributors to cover the expenses of adjusting the customer's coupler, of any necessary rework, and of any delivery preparation expenses incurred with the sale of each trailer (Pet. App. 24-25).



distributors by increasing the supplemental charge to distributors by $50 per unit. In so doing, Fruehauf shifted the make-ready charge from the wholesale price to the supplemental billings (Pet. App. 25). Co-conspirator Chawner told distributors that this $50 per unit increase in the supplemental charges "was strictly fictional for the purpose of saving $5 in excise tax" (Pet. App. 25-26).

As a result of questions raised during the Internal Revenue Service's audit of its excise tax returns, Fruehauf made certain changes in its supplemental charge plan. In January 1965, Fruehauf changed the designations "Printed Matter," and "Management Consulting" to "Finance" and "Teletype." Fruehauf continued to post such charges on its books as recovery of costs applicable to new trailers. The supplemental charge for "teletype" was an allocation of Fruehauf's total expenses of operating its teletype system, over and above that already recouped through monthly teletype "rental" charges to each distributor. The supplemental charge for "finance" was a proration of the total operating expenses of Fruehauf Finance Company, a wholly-owned subsidiary of Fruehauf. The supplemental "interest" charge was equal to nine percent per annum computed on the month-ending balances of each distributor's equipment and parts and services accounts. These billing designations continued in effect at least through February 8, 1966, the date of the filing of the quarterly manufacturers' excise tax return for the fourth calendar

quarter of 1965—the last overt act charged in the indictment (Pet. App. 28-29).

2. *The Tire Tax Credit Scheme.* During the period of the conspiracy (1956-1965), petitioners further understated the excise tax liability of Fruehauf by overstating the manufacturers' excise tax credit with respect to tires sold in connection with taxable trailers. Like the supplemental charge plan, the tire tax credit scheme involved dual invoicing. As the purchaser of tires, Fruehauf received a monthly rebate on tires purchased from the tire manufacturer. The various tire manufacturers publish price lists known as OEM (original equipment-manufacturer) price lists (Pet. App. 29). Since it was a large-volume purchaser of tires, Fruehauf was able to negotiate contracts for the purchase of tires at prices substantially below the OEM level. Fruehauf referred to such prices as its "confidential" prices. Petitioner Grace participated in the contract negotiations with tire companies resulting in "confidential" prices and had final authority to approve such contracts both as to price and product quality standards (Pet. App. 29). At the request of Fruehauf, the tire manufacturers billed Fruehauf on the basis of OEM prices, rather than for the negotiated "confidential" prices. The difference between the OEM or invoice price and the actual agreed price was rebated to Fruehauf by means of monthly checks or credit memoranda (Pet. App. 29).

Fruehauf personnel, including petitioners Rowan and Grace, were at all times aware of the actual price of the tires and of the amount of the rebate to which



Fruehauf was entitled prior to actual receipt of a check or credit memorandum from the tire manufacturers. However, Fruehauf claimed a "tire tax credit" against its manufacturers' excise tax liability on the basis of the OEM prices, without reference to the lower "confidential" price that actually governed the purchase of tires (Pet. App. 29-30).

In December 1958, Morris discussed the tire tax credit issue with Fruehauf's counsel. At that time, counsel advised that, in his opinion, Fruehauf's computation of tire tax credits was "highly questionable" and "created a potential liability that the company should recognize if it chooses to continue this practice" (IV R. 341-342).[5] Fruehauf nevertheless continued to compute its tire tax credits on the basis of the OEM invoiced price without regard to rebates (Pet. App. 30).

The government introduced evidence that petitioner Rowan falsely represented to the investigating revenue agent that Fruehauf computed its tire tax credits on the basis of the OEM price as the result of an oversight. The evidence further showed that Morris told the examining agent that he had not even been aware that Fruehauf received rebates on tire purchases until 1964 (Pet. App. 31). After the tire tax credit procedures had been discovered by the examining agents, Fruehauf sought the advice of counsel and, commencing January 1, 1965, the tire tax credit

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[5] "R." refers to the five-volume separately bound appendix filed in the court of appeals.

was computed on the basis of the actual cost of the tires, net of trade rebates or discounts (Pet. App. 31).

## ARGUMENT

1. Petitioners argue (Pet. 10-17) that there was a fatal variance between the indictment and the proof adduced at trial. They contend that while the indictment charged that Fruehauf's "supplemental billings" were "for these non-existent services," the proof at trial showed that some of the services were rendered. In petitioners' view (Pet. 11), this difference "constituted a constructive amendment to the indictment and, therefore, a 'fatal variance.' "

The court of appeals properly rejected this claim. As it observed (Pet. App. 35), there is a distinction "between amendments, formal and constructive, which are considered reversible per se, and variances, which are reversible error only if prejudicial to the defendant." Thus, in *Ex parte Bain*, 121 U.S. 1 (1887), the Court held that the Fifth Amendment requirement that the grand jury issue an indictment forbade the government from formally amending the charging terms of an indictment. However, a variance between the indictment and the proof at trial is harmless error if it does not prejudice the defendant's right to fair notice and freedom from double jeopardy. *Berger* v. *United States*, 295 U.S. 78 (1935).

Here, there was no formal amendment of the indictment within the meaning of *Ex parte Bain*. Petitioners were convicted of conspiracy to defraud the United States, to evade payment of excise taxes, and to assist in the preparation of false excise tax returns, the crime charged in the indictment (see Pet. App. 37-38 n.20). The court of appeals therefore correctly ruled that the indictment contained "the information required to be there to give [petitioners] fair notice and to insure that the indictment formed the basis of the convictions" (Pet. App. 39).



The court of appeals likewise properly held that this case does not present a constructive amendment of the indictment of the type involved in *Stirone* v. *United States*, 361 U.S. 212 (1960), or *Russell* v. *United States*, 369 U.S. 749 (1962). In *Stirone*, the defendant was charged with interfering with interstate commerce by extortion, in violation of the Hobbs Act. The only interstate commerce mentioned in the indictment was the importation of sand to be used in building a steel plant. However, the trial judge permitted the introduction of evidence to show interference with the exportation of steel to be manufactured in the plant, and instructed the jury that it could convict either for interference with the commerce of sand or steel. On these facts, the Court held that it was prejudicial error to submit to the jury the question whether the extortion interfered with the exportation of steel because the indictment did not so charge. In *Russell*, an indictment charging refusal to answer questions of a committee of Congress failed to specify the subject under committee inquiry.

Here, on the other hand, petitioners were convicted of the crime of conspiracy as charged in the indict-

ment, *viz.*, the supplemental billings scheme and the overstated tire tax credits. Hence, contrary to petitioners' assertion (Pet. 14-15), neither *Stirone* nor *Russell* is a controlling precedent.

Thus, petitioners' claim can rest only upon a variance between the particulars alleged in the indictment and the proof at trial. But as the court of appeals observed (Pet. App. 39), such a variance constitutes reversible error only when it involves an element of surprise prejudicial to the defendant. *United States* v. *Ragen*, 314 U.S. 513 (1942). Here, however, there was no such prejudicial surprise. The indictment fairly encompassed four theories supported by the proof at trial: (1) that no "extra" services were rendered to distributors that were not rendered to retail purchasers; (2) that the supplemental billings were not for any such "extra" services that may have been rendered; (3) that any "extra" services rendered did not remotely approach in value the amounts billed as supplemental charges; and (4) that the billings for the "extra" services were required to be included in the taxable price of the trailers.

The court of appeals correctly concluded that the first three of these theories were incorporated in the indictment on the authority of *United States* v. *Ragen*, *supra*. There, an indictment for conspiracy to evade corporate income taxes similarly charged that "no services" were rendered to support certain commissions. Like petitioners, the defendants argued



that there was a fatal variance between the indictment and the proof because the indictment alleged that the commission payments were dividends in their entirety while the evidence showed that some services were performed. But this Court rejected the claim of variance, observing that "the gravamen of the charge is distribution of dividends in the guise of commissions, and the respondents cannot fairly claim that they were not adequately apprised of the nature of the offense. Any variance which existed, at most a matter of the extent of the alleged tax evasion, involves no elements of surprise prejudicial to the respondents' efforts to prepare their defense" (314 U.S. at 526).

Finally, petitioners argue (Pet. 10-12) that there was a variance between the fourth theory—that the billings for "extra" services were required to be included in the taxable price of the trailers—and the proof at trial. As the court of appeals pointed out (Pet. App. 42), subpart (11) of the indictment charged that it was part of the conspiracy "that the invoiced price to the wholesalers would be reduced by an arbitrary percentage to establish a false lower Excise Tax base, and that a substantial amount would be recouped in the form of supplemental billings for these non-existent services." While petitioners claim (Pet. 11) that the decision below "disregarded the allegation in paragraph (11)," the court correctly concluded that "[o]ne method of manipulating the wholesale price would be the exclusion of charges

required to be included in the wholesale price" (Pet. App. 43). Thus, the proof at trial was consistent with the fourth theory alleged in the indictment.

Moreover, petitioners cannot claim that they were misled or surprised when the government presented evidence in support of the fourth theory in the indictment. In response to petitioners' motion for a bill of particulars, the government properly informed them that they would advance a number of prosecution theories, including the theory that the billing for "extra" services was required to be included in the taxable price of the trailers. The response stated as follows (Pet. App. 43):

> (10)(b) The Government will contend the Fruehauf Corporation rendered no excludable services to its wholesale distributors, nor will it concede that any services were rendered.
>
> (10)(c) The Government will contend that if any services were rendered, the charges therefore were not properly excludable from the excise tax base.

Thus, petitioners had ample notice in advance of trial that even if the evidence showed that some services were rendered, the government would alternatively contend that the charges for those services were not excludable from the excise tax base. The court of appeals therefore correctly held that even if there was a variance, petitioners were not prejudiced in the preparation of their defense.



2.a. Petitioners further argue (Pet. 17-25) that their convictions are barred by the statute of limitations and that the decision below holding that the six-year period of limitations of 26 U.S.C. 6531(8) is applicable conflicts with *United States* v. *McElvain*, 272 U.S. 633 (1926).

The decision below correctly concluded that petitioners' convictions were not barred by the statute of limitations. Here, petitioners were charged with a conspiracy having three objectives: (1) to defraud the United States by impeding the lawful governmental functions of the Internal Revenue Service; (2) to attempt to evade and defeat the payment of excise taxes by Fruehauf; and (3) to aid in the preparation of false excise tax returns (see Pet. App. 37-38 n.20). As the court of appeals observed (Pet. App. 68), the statute of limitations applicable to the second objective of the conspiracy is the six-year period of 26 U.S.C. 6531(8). That subparagraph provides that the period of limitation shall be six years "for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof." Here, the indictment was filed on November 9, 1970, which was within six years of the commission of the last five overt acts charged to be part of the conspiracy (I-R. 177). Hence, the indictment was timely under 26 U.S.C. 6531(8).

Petitioners acknowledge (Pet. 19) that the six-year statute would be applicable if their conspiracy

had been limited to the single objective of attempting to evade and defeat the payment of taxes. However, they argue (Pet. 17-20) that the existence of the other two objectives (to defraud the United States and to aid in the preparation of false returns) renders the general five-year statute of limitations for non-capital offenses provided by 18 U.S.C. 3282 applicable to the entire conspiracy.

The court of appeals correctly held that the six-year statute applies to this case, on the authority of *Braverman* v. *United States*, 317 U.S. 49 (1942). There, the defendants were charged with a multi-objective conspiracy to violate several different internal revenue statutes involving the occupational tax on distilled spirits (*id.* at 50 n.1). Like petitioners, one of the defendants claimed that his prosecution was barred by the three-year statute of limitations then applicable generally to criminal offenses, under the decision in *United States* v. *McElvain*, *supra*. But this Court rejected the claim and held that the six-year period of the predecessor of 26 U.S.C. 6531(8) was applicable. In the Court's view, *McElvain* was distinguishable on the ground that it involved a conspiracy solely to defraud the United States and not to attempt to evade the payment of tax. As the Court stated: "To be within [26 U.S.C. 6531(8)] it is not necessary that the conspiracy have as its object the commission of an offense in which defrauding or attempting to defraud the United States is an element. *It is enough that the conspiracy involves an attempt to evade or defeat the payment of federal taxes,*



*which was among the objects of the conspiracy of which petitioner was convicted*" (*id.* at 55) (emphasis added). Indeed, the Court so held in *Braverman* even though the indictment did not specify that one of the objectives was to attempt to evade or defeat the payment of taxes. It would therefore appear that this case, where the indictment charged such an objective, follows a fortiori from *Braverman*.[6]

Under the rule established in *Braverman*, a multi-objective conspiracy is a single crime and is governed by a single statute of limitations. Since the indictment charged and the evidence established[7] a con-

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[6] Since this case is controlled by *Braverman* and 26 U.S.C. 6531(8), it is unnecessary to reach the question raised by petitioners (Pet. 17) as to the correctness of *United States* v. *Lowder*, 492 F.2d 953 (4th Cir. 1974), cert. denied, 419 U.S. 1092 (1975), cited by the decision below (Pet. App. 68). There, the court held that a prosecution for a single conspiracy to defraud the United States by impeding the functions of the Internal Revenue Service was governed by the six-year statute of limitations of 26 U.S.C. 6531(1) rather than the general five-year statute of 18 U.S.C. 3282. With respect to that question, we believe that the statutory language of Section 6531(1), which extends the six-year period to "offenses involving the defrauding or attempting to defraud the United States or any agency thereof, *whether by conspiracy or not*, and in any manner" (emphasis supplied), supports the decision in *Lowder*. However, we agree that some doubt is created regarding this reading of the statute by *United States* v. *McElvain*, *supra*. See Brief for the United States in Opposition in *United States* v. *Lowder*, at 4-12 (October Term, 1974, No. 73-1702). We are serving a copy of the *Lowder* brief upon counsel for petitioners.

[7] With respect to the evidence, the court of appeals observed that "[i]n fact, this was not a close case" (Pet. App. 3 n.3).

spiracy to attempt to evade and defeat the payment of tax, the six-year period of 26 U.S.C. 6531(8) therefore applies to the entire conspiracy.[8]

b. Even if the five-year statute of limitations of 18 U.S.C. 3282 were applicable, as petitioners urge, the decision below correctly held that the prosecution was not time-barred. As the court stated (Pet. App. 68): "The last overt act alleged in the indictment was the filing of the manufacturers excise tax return for the final calendar quarter of 1965, which occurred February 8, 1966. The present indictment was returned November 9, 1970, less than five years after the last overt act in the indictment."

Petitioners argue (Pet. 23-25) that they were entitled to offset certain overpayments to defeat most of the deficiency for the last quarter of 1965 and that there was, therefore, a failure of proof as to the overt act alleging the filing of a false excise tax return for that quarter. To begin with, the government's proof established tax deficiencies for each of the last five calendar quarters listed in the indictment—the last quarter of 1964 and the four quarters of 1965 (I R.

[8] Even on the assumption that the other two objectives of the conspiracy charged in the indictment were time barred, this would not require the dismissal of the entire indictment. The district court found petitioners guilty of each of the three objectives of the conspiracy (I R. 204-205, Finding 141). If one or even two of these objectives were barred by the statute of limitations, the court's findings in this bench trial with respect to those objectives could be treated as surplusage and ignored. See *Ford* v. *United States*, 273 U.S. 593, 602 (1927); *United States* v. *Albanese*, 224 F.2d 879, 881 (2d Cir. 1955); cf. *Prussian* v. *United States*, 282 U.S. 675, 680-681 (1931).



205, Finding 142; IV R. 560-562). As the court of appeals correctly observed (Pet. App. 72-73):

> Even if it were necessary in this conspiracy case for the United States to plead and prove that taxes were due and owing (and it is not), the Government carried that burden. The indictment charged and the district judge found that appellant Fruehauf had substantially understated its excise tax liability in its returns during the period of the conspiracy as a result of the supplemental charge plan and excessive tire tax credits. The district judge also found that there were taxes owing for each of the last five calendar quarters listed in the indictment, the last quarter of 1964 and the four quarters of 1965. Appellants' contention that against these deficiencies they are entitled to set off certain overpayments, resulting from the tax paid on nontaxable refrigeration units, in order to defeat criminal liability is ridiculous.

Moreover, contrary to petitioners' claim (Pet. 24-25), any offsetting credits do not result in a failure of proof with respect to the overt act for the last quarter of 1965. The indictment charged that petitioners filed excise tax returns for each of the 37 calendar quarters during the conspiracy, and that the petitioners and co-conspirator Morris "then and there well knew that the purported Excise Tax liability was substantially understated" (I R. 27). The district court found that petitioners "with full knowledge * * * willfully and unlawfully participated in the plan to evade a substantial part of Fruehauf

Corporation's excise tax liability" (I R. 204, Finding 141). Thus, even if Fruehauf subsequently became entitled to offsetting credits for later years, such after-the-fact events do not refute the critical fact that at the time Fruehauf's returns were filed petitioners "then and there well knew" that the returns were false and served to effectuate the ends of the conspiracy.[9]

In this case, the existence of petitioners' conspiracy does not depend upon actual tax deficiencies with respect to any of the returns in question. Cf. *Poliafico* v. *United States*, 237 F.2d 97, 105-106 (6th Cir. 1956). The conspiracy was proved by evidence that established that petitioners were aware of their illegal acts, which had as their natural consequence the understatement of federal excise taxes. The returns in question were directed towards this goal; it is immaterial whether the returns in fact understated Fruehauf's tax liability, since petitioners intended that result.[10]

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[9] The credits arose as the result of administrative action on the part of the Internal Revenue Service in 1968. See Rev. Rul. 68-136, 1968-1 Cum. Bull. 453 (II R. 747). Prior to trial, Fruehauf had claimed these credits against its excise tax liability for several quarters commencing in 1969—some three years after the filing of the last return constituting an overt act (I R. 29; II R. 747-748).

[10] A conspiracy exists upon proof of overt acts even if such acts are not alleged in the indictment. See *United States* v. *Fassoulis*, 445 F.2d 13, 19 (2d Cir.), cert. denied, 404 U.S. 858 (1971); *United States* v. *Armone*, 363 F.2d 385, 400 (2d Cir.), cert. denied, 385 U.S. 957 (1966); *United States* v. *Negro*, 164 F.2d 168 (2d Cir. 1947). Here, such unpleaded overt acts exist in the form of (1) each equipment invoice submitted to a distributor which concealed Fruehauf's warranty allowance in its discount structure; and (2) in the submission of each monthly supplemental charge invoice, which constituted an unrecognized part of the taxable price of each distributor sale.



3. Finally, petitioners contend (Pet. 25-27) that the indictment was defective because it failed to allege willfulness in setting forth the objectives of the conspiracy. In so arguing, petitioners implicitly assume that they were charged with substantive offenses rather than conspiracy. But the crime of conspiracy is entirely separate from the substantive offense. See, *e.g.*, *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915). Thus, as the court of appeals correctly recognized (Pet. App. 70), petitioners' argument is foreclosed by this Court's decision in *Wong Tai* v. *United States*, 273 U.S. 77 (1927). There, the Court stated (*id.* at 81; citations omitted):

> It is well settled that in an indictment for conspiracy to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy * * * or to state such object with the detail which would be required in an indictment for committing the substantive offense * * *. In charging such a conspiracy "certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary."

Accord: *United States* v. *Branan*, 457 F.2d 1062, 1063-1065 (6th Cir. 1972); *United States* v. *Mixon*, 374 F.2d 20, 22 (6th Cir. 1967); *Davis* v. *United States*, 253 F.2d 24, 25 (6th Cir. 1958).[11]

Here, as in *Wong Tai* (see 273 U.S. at 79), the indictment charged that petitioners "then and there well knew" that Fruehauf's excise tax liability was substantially understated (I R. 27). That allegation, coupled with the statement comprising the "methods and means" portion of the indictment (I R. 25-27, paras. 7-14), was sufficient to put petitioners on notice of the charges against them and to permit the plea of double jeopardy should that plea become appropriate.[12] Nothing more is required. *Russell* v. *United*

[11] *Conrad* v. *United States*, 127 F. 798 (5th Cir. 1904); *Middlebrooks* v. *United States*, 23 F.2d 244 (5th Cir. 1928); and *United States* v. *Comstock*, 162 F. 415 (D. R.I. 1908), cited by petitioners (Pet. 26-27) as requiring an allegation of "willfulness" as to the objective of a conspiracy indictment, are no longer the law either in their respective circuits or the other circuits. See *United States* v. *Mendoza*, 473 F.2d 692, 695 (5th Cir. 1972), and cases cited in *Nelson* v. *United States*, 406 F.2d 1136, 1137 n.3 (10th Cir. 1969).

[12] The indictment did, of course, charge that petitioners "wilfully and unlawfully conspired with each other, and with other persons * * *" (I R. 23) to carry out the objects of the conspiracy. When read as a whole, the indictment unquestionably put petitioners on notice that they were charged with a voluntary, intentional violation of a known legal duty (*viz.*, a "willful" violation (see *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976)), and the evidence at trial overwhelmingly proved that petitioners' acts directed at the fulfillment of the illegal objects of the conspiracy were done knowingly, voluntarily and intentionally. Indeed, the district court specifically found (I R. 204, Finding 141; emphasis added) that petitioners "Grace and Rowan, together with the co-conspirators Morris and Chawner, with full knowledge of the deceptive invoicing procedures, *willfully and unlawfully* participated in the plan to evade a substantial part of Fruehauf Corporation's excise tax liability * * *."



*States, supra*, 369 U.S. at 763-764. See also *Gariepy* v. *United States*, 189 F.2d 459, 460-461 (6th Cir. 1951). Cf. *Nelson* v. *United States*, 406 F.2d 1136 (10th Cir. 1969).

Petitioners err in contending (Pet. 27) that the court of appeals rested its decision on the conclusion that a conspiracy indictment is sufficient if it identifies the object offenses and cites the pertinent statutory provisions. To be sure, the court stated (Pet. App. 70) that "the indictment in the present case identified the object offenses, referring appellants to the specific statutory sections involved, and for the purpose of an indictment charging a conspiracy offense, that was sufficient." But the court went on to state (Pet. App. 70-71):

> Moreover, the indictment in the present case charged that appellants "then and there well knew" that Fruehauf's excise tax liability was understated, which is a statement that appellants did have a willful state of mind with respect to the tax evasion and false returns object offenses of the conspiracy.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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